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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 768

THE GRAY LINE COMPANY, a corporation, *Petitioner*,

v.

R. C. GRANDQUIST, District Director of Internal Revenue, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Gray Line Company, petitioner herein, respectfully petitions for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit in order to review a judgment of that court entered on October 12, 1956, affirming in part a judgment of the District Court of the United States for the District of Oregon.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set forth herein as Appendix A and is reported at 237 F.2d 390. Its accompanying judgment is set forth as Appendix B herein. That court's order denying a petition for rehearing is set forth herein as Appendix C.

The opinion of the United States District Court for the District of Oregon is set forth herein as Appendix D. It is not reported in the Federal Supplement but is reported as 48 AFTR 1839.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1956. A timely petition for rehearing was denied on November 20, 1956. This petition for a writ of certiorari was filed on February 11, 1957, less than 90 days after the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. May a federal court, in interpreting and applying a provision of the Internal Revenue Code levying a transportation tax, ignore a pertinent Revenue Ruling that is designed to interpret the Code provision and that is plainly applicable to the factual situation in issue?

2. Does Section 3469(a) of the Internal Revenue Code of 1939 apply to transportation to and from an airport and surrounding areas by limousines having a seating capacity of less than ten adult passengers, including the driver, where the passengers are picked up and delivered to any place or places designated by them, as distinguished from fixed pickup and discharge points established by the limousine company?

3. Can proof of the collection of the federal transportation tax be based upon a dubious inference in the face of undisputed probative evidence to the contrary?

STATUTES, REGULATIONS AND RULINGS INVOLVED

26 USCA 3469 (a), Internal Revenue Code of 1939:

Section 3469. Tax on transportation of persons, etc.

(a) *Transportation.* There shall be imposed . . . upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water, or air within or without the United States . . . a tax equal to 10 per centum[1] of the amount so paid . . . Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

Treasury Regulations 42 (1942 ed.):

Sec. 130.58. *Motor Vehicles with Seating Capacity of Less Than 10.* No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including the driver, unless such vehicle is operated on an established line. The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term applies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

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[1] The rate was increased to 15 per cent by Section 1650 of the Internal Revenue Code of 1939 which was added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 302, Revenue Act of 1943, c. 63, 58 Stat. 21.

Revenue Ruling 54-47, CB 1954-1, 269:

> Where limousines are operated to and from an airport and surrounding areas and passengers are picked up or delivered at any place or places designated by them, as distinguished from fixed pick-up and discharge points established by the limousine company, such vehicles are not considered operated on an established line within the meaning of Section 3469 of the Internal Revenue Code. If such vehicles have a seating capacity of less than 10 adult passengers, including the driver, the tax on the transportation of persons is not applicable to amounts paid for such transportation.

STATEMENT OF THE CASE

During July, 1950 (the month involved) petitioner was engaged in the transportation business. One of its activities consisted of providing and operating a limousine service for passengers of various airlines between the City of Portland, Oregon, and the Portland Airport (Finding of Fact 7, Tr 44). The nature of this limousine service was "on call" service, meaning that no trips were made unless petitioner was notified by the particular airline that there were passengers desiring transportation (Finding of Fact 13, Tr 46). In this service only seven passenger limousines were used by petitioner during this period except that on one early morning emergency occasion a bus with a seating capacity of more than ten adult passengers was used to transport airline passengers (Ex. 2, 3, 4).

As shown by exhibit 13, Portland is divided by the Willamette River which flows through the city in a generally northerly direction. The "downtown" area of Portland is on the west side of the Willamette River and consists of approximately 520 acres divided into approximately 375 blocks, for the most part 200

feet square. The airport is approximately 10 miles from the downtown area of Portland (Finding of Fact 16, Tr 48) and lies near the edge of the east side of Portland. Consequently, in traveling to and from the downtown area and the airport, petitioner's limousines traveled through the east side of the city.

Petitioner did not operate its airport limousine service on a route established by public authority. Petitioner did not establish or recommend any route over which its limousines were to be driven in going to and from the airport. Petitioner did not publish, post or print any schedules of its service and did not advertise that it was operating this service (Finding of Fact 20, Tr 48, 49). Petitioner did not transport the general public in its airport limousines (Tr 87, 90). None of the limousines used bore any signs except one on which was printed the words "Gray Line Limousine Service" (Finding of Fact 8, Tr 45).

Airline passengers desiring transportation to the airport informed the airline company of that fact and made arrangements with the airline company as to when and where they would be picked up by the limousines. This was usually in the downtown area at the offices of the airline company or at a hotel. They would be picked up elsewhere if they so arranged with the airline. The limousine drivers were notified by the airline where to pick up the passengers (Pre-Trial Order 10, Tr 25, Findings of Fact 10, 13, Tr 45, 46, 75, 88).

Petitioner did not determine the places at which the passengers would be picked up. These were determined by the airline company prior to each trip at places convenient to their passengers (Finding of Fact

10, Tr 45) with the passengers usually deciding on the place (Tr 83). The limousines would be driven only to the specific places in the downtown area of Portland where there were passengers desiring transportation (Finding of Fact 13, Tr 46).

The limousines were operated also from the airport to the downtown area. Passengers being brought from the airport were delivered to any place in the downtown area designated by them (Tr 72, 73, 77) and the discharge places in the downtown area varied from trip to trip (Tr 88, 90, 91). In addition, passengers being brought from the airport would be delivered to any point specified by them on the east side of Portland, Oregon, between the downtown area and the airport as long as the point specified was in the general area of the east side through which the limousine would be driven in going from the airport to the downtown area. Upon request of a passenger the driver would leave the particular street on which the limousine was being driven and deliver the passenger to the place designated by the passenger if in the general direction of the downtown area (Finding 11, Tr 46). No limousine was driven to the airport unless there were passengers to carry to or from the airport. At times petitioner would send a limousine to the airport to meet an incoming plane without the limousine first going to the downtown area of Portland. When it appeared that no airline passengers arriving at the airport within a reasonable time would desire limousine service from the airport, the limousine would return to the petitioner's garage near the northern edge of the downtown area without first going anywhere else (Finding of Fact 14, Tr 46, 47). Only 25 per cent of arriving passengers used the limousine service,

and there were times when planes would either come in or leave Portland without petitioner's limousines making any trips (Finding of Fact 15, Tr 47).

Petitioner did not collect or attempt to collect a tax from its limousine passengers (Tr 80, 81). In fact, petitioner scrupulously avoided collecting a tax or anything that might be construed as a tax. Since 1947 the issues presented in this case had been the subject of discussion and dispute between petitioner and the Bureau of Internal Revenue (Tr 68, Ex. 1, 11, 14, 21). Because of the case of *Royce et al*, v. *Squire*, 168 F.2d 250 (C.A. 9, 1948) petitioner believed that if it were to collect transportation taxes from its limousine passengers it would have no standing to seek a judicial determination of whether its airport limousine service was operated on an established line and therefore subject to the provisions of Section 3469 of the Internal Revenue Code of 1939. Petitioner steadfastly maintained that it did not operate on an established line and desired such judicial determination. Consequently petitioner carefully avoided collecting such tax.

Petitioner's books and records do not reflect the collection of transportation tax from airline passengers and none of the limousine revenue was shown on petitioner's books as a tax obligation. (Finding of Fact 28, Tr 50). The full amount collected by petitioner from the airline passengers for its limousine service was reported by petitioner as income (Ex. 6, 7, 10).

As a separate part of its business petitioner conduced sight seeing operations by means of buses having a seating capacity of more than 10 adult passengers. Petitioner collects transportation taxes from its

sight seeing passengers, and it maintains an account in which it enters the taxes so collected. (Ex. 9, Tr 92, 93, 94). Petitioner records as income only that portion of the money paid by said bus passengers not accounted for and set aside as a transportation tax. (Ex. 6, 8, 9, 10). The tax so collected was duly paid by petitioner to the Collector of Internal Revenue and is not in issue in this case.

As stated, the issues in this case have been the subject of discussion and dispute between petitioner and the Bureau of Internal Revenue since 1947. Petitioner's attorneys advised it that Section 3469 did not apply to its airline service. (Ex. 1, 14). Petitioner was also so informed by a Deputy Collector of Internal Revenue. (Ex. 1.) A deputy Commissioner of Internal Revenue, by letter dated June 30, 1948, expressed the opinion that petitioner's service was subject to the transportation tax and advised petitioner to collect such tax (Ex. 21). Petitioner never acquieced in the interpretation expressed by the Deputy Commissioner and contested the same and did not collect any tax after receiving such letter.

Petitioner's one way charge for transportation to and from the airport was increased from 85 cents to $1.00 by agreement with Northwest Airlines dated August 21, 1949 (Finding of Fact 24, Tr 49). Both prior to and after August 21, 1949, petitioner's one way charge for transportation to or from the airport for employees of the airline companies was 60 cents.

The Commissioner of Internal Revenue assessed against and the respondent collected from petitioner a sum of money as transportation taxes, penalties, and interest on the theory that petitioner operated its airport limousine service on an established line within

the meaning of Section 3469. Petitioner paid the assessment and filed a timely refund claim which the Commissioner of Internal Revenue rejected. Upon paying the tax assessed in this case, the payment was charged on petitioner's books to an account called "Other Deferred Debits" and was neither entered nor recognized as a tax liability, nor deducted from petitioner's income but is regarded by petitioner as an "Account Receivable" (Tr. 92, 93, 94).

The case was tried in the District Court without a jury. The court upheld the Commissioner's determination. The Court of Appeals affirmed the District Court judgment in part and reversed that part of the judgment which sustained the Commissioner's assessment of penalty against petitioner.

Petitioner contends that the Court of Appeals, in affirming the judgment of the District Court in part, acted contrary to the provisions of Section 3469 (a) of the Internal Revenue Code of 1939 and failed to give effect to the express language of Treasury Regulations 42, Section 130.58, as interpreted in Revenue Ruling 54-47.

REASONS FOR GRANTING THE WRIT

1. The Decision Below, in Refusing to Recognize and Give Effect to Revenue Ruling 54-47, Conflicts With This Court's Decisions Holding That Such Administrative Rulings Must be Sustained Unless Unreasonable or Inconsistent With the Revenue Statute

Section 3469(a) of the Internal Revenue Code provides that the tax on the transportation of persons "shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line." But this

code provision contains no definition or standard for determining when a vehicle is "operated on an established line". It "is so general in its terms as to render an interpretative regulation appropriate". *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114 (1939); *Morrissey* v. *Commissioner*, 296 U.S. 344, 354-5 (1935).

The Treasury Department attempted to interpret and define the statutory concept of an established line by promulgating Sec. 130.58 of Treasury Regulations 42 (1942 ed.). This defined the term "operated on an established line" to mean "operated with some degree of regularity between definite points" with the person rendering the service maintaining and exercising "control over the direction, route, time, number of passengers carried, etc."

But this definition was still not precise enough to permit ready application to airport limousine service. Accordingly, Revenue Ruling 54-47, specifically directed to that problem, was promulgated. That ruling was not premised in its terms upon any particular fact situation but was addressed to the general airport limousine problem. It was in every sense an addition to and a refinement of Sec. 130.58 of Treasury Regulations 42. It provided that where such limousines "are operated to and from an airport and surrounding areas and passengers are picked up or delivered at any place or places designated by them, as distinguished from fixed pickup and discharge points established by the limousine company, such vehicles are not considered operated on an established line within the meaning of Section 3469 of the Internal Revenue Code."

The important and controlling factor in the application of Section 3469 to airport limousine service thus becomes whether the limousine company establishes fixed pickup and discharge points. In the instant case, petitioner did not designate either pickup or discharge points. The Findings of Fact in this case include the following:

> 10. . . . In case the airplane passengers desired such limousine service, arrangements were made with respect to where the passengers would be "picked up" . . . *The plaintiff [petitioner] did not determine the "pickup" points in the downtown area.* The airline companies established them at points convenient to their passengers. Plaintiff [petitioner] did not pick up passengers other than at designated points or along the route followed between the designated points or between the downtown area of Portland and the Airport. (Finding of Fact 10, Tr 45, emphasis supplied).
>
> 11. Passengers being brought from the Airport were delivered at any place or places other than those designated in the Portland downtown area, provided such place or places were in the general direction between the designated points, or at any place on the East side of Portland, Oregon, between the Airport and downtown Portland. In the latter instance the limousine would leave the street on which it was traveling *to deliver the passenger at the place designated by the passenger,* if such place were in the general direction of downtown Portland." (Finding of Fact 11, Tr 46, emphasis supplied).

It is clear that, based upon the District Court's findings in this case, petitioner's operations involve the pick up and delivery of passengers "at any place or places designated by them" within the meaning of Revenue Ruling 54-47. The transportation tax im-

posed by Section 3469(a) of the Internal Revenue Code is thus inapplicable.

The ruling of the Court of Appeals in sustaining the application of the tax is clearly and directly in conflict with the construction given Section 3469(a) by the Commissioner of Internal Revenue, the head of the administrative agency charged with its enforcement. As a result of the existence of this conflict in statutory interpretation, taxpayers in the airport transportation business in the area within the jurisdiction of the Court of Appeals for the Ninth Circuit find themselves subject to the provisions of a tax which apparently is not being applied and will not be applied to similar taxpayers located in areas outside the jurisdiction of this Court of Appeals.

More importantly, the action of the Court of Appeals in ignoring and refusing to apply Revenue Ruling 54-47 to the facts of this case squarely conflicts with the host of cases in this Court establishing the principle that specific administrative rulings and interpretations of the Internal Revenue Code must be sustained and applied unless unreasonable and plainly inconsistent with the revenue statutes. *Commissioner* v. *Sternberger's Estate,* 348 U.S. 187, 199 (1955); *Commissioner* v. *South Texas Co.,* 333 U.S. 496, 501 (1948); *Neuberger* v. *Commissioner,* 311 U.S. 83, 89 (1940). And see *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933); *Fawcus Machine Co.* v. *United States,* 282 U.S. 375, 378 (1931).

In other words, Revenue Ruling 54-47 is a studied administrative interpretation of Section 3469(a) of the Code in the light of airport limousine service. This interpretation by those charged with the administration of the statute "should not be overruled ex-

cept for weighty reasons" such as unreasonableness or plain inconsistency with statutory language. *Commissioner* v. *South Texas Co., supra,* 501. No such weighty reasons are here apparent for ignoring or overruling Revenue Ruling 54-47.

Revenue Ruling 54-47 has been given added stature by the subsequent enactment of the Internal Revenue Code of 1954. The ruling was promulgated early in 1954. On August 16, 1954, the new Code became law. As Chapter 33, Subchapter C, Part I, Sections 4261 and 4262 of the 1954 Code, Congress reenacted, in full, the provisions of Section 3469 of the 1939 Code. The form of the section was changed but the essential substantive provisions were retained. This reenactment of the relevant statutory provisions took place approximately six months after Revenue Ruling 54-47 had been added to the body of administrative construction. "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U.S. 110, 115 (1939). And see *Wilmette Park District* v. *Campbell,* 338 U.S. 411 (1949); *Crane* v. *Commissioner,* 331 U.S. 1 (1947); *Helvering* v. *Winmill,* 305 U.S. 79 (1938); *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U.S. 269 (1933).

The failure of the Court of Appeals to recognize and apply Revenue Ruling 54-47 and to give petitioner the benefit of its interpretation justifies the exercise of this Court's certiorari jurisdiction to correct the error. The court below has ignored the repeated admonitions of this Court that administrative rulings are to be respected absent some weighty consideration to the contrary. Fair administration of the revenue

laws demands that this principle be reasserted once more.

It is obviously not proper to clothe with the force of law only a portion of administrative construction placed upon statutory language, thereby disregarding the balance of the administrative interpretation in existence at the time of Congressional reenactment of the Code. And this is particularly true when the disregarded part of the administrative interpretation deals specifically with the problem in issue. Such judicial disregard of an applicable Revenue Ruling can only result in distortion, injustice and conflict among the courts.

2. The Decision Below Involves a Problem of Increasing and Wide Importance in the Administration of the Federal Transportation Tax

The problem of what constitutes "an established line" of an airport limousine service within the meaning of Section 3469(a) of the Internal Revenue Code of 1939, as repeated in the 1954 Code, has just begun to make its impact upon the courts. As of January 1, 1955, there were approximately 74 limousine operations serving airports in the United States, 22 combination motor coach and limousine operations and 31 combination limousine and taxicab operation—making approximately 127 transportation companies confronted with essentially the same problem involved in the case at bar.

This problem is such as to give rise to increasing dispute and litigation between the respective airport transportation companies and the Commissioner of Internal Revenue. In most instances each of these companies operates in a manner substantially similar

to that of petitioner. In view of this similarity and the national scope of the question presented, it is one which should be resolved by this Court. And the increasing importance of transportation to and from airports makes a definitive resolution at this time appropriate to the fair and effective administration of the Internal Revenue Code.

The specific problem of whether a limousine company providing transportation to and from an airport is operating on "an established line" when it neither designates the pick up nor the discharge points has been the subject of but one other reported case. In *Royce* v. *Squire,* 73 F. Supp. 510 (1947), the District Court for the Western District of Washington held on the basis of the facts in that case that the airport transportation service constituted an operation of "an established line". The *Royce* case was appealed to the Court of Appeals for the Ninth Circuit and affirmed on other grounds without the Court of Appeals passing upon the correctness of the District Court's decision. 168 F.2d 250 (C.A. 9, 1948).

But despite the absence of a multitude of judicial rulings on the subject, a substantial number of similar taxpayers throughout the country are faced with the same problem. And although the instant case directly involves only a few hundred dollars, actually it concerns and affects a very substantial sum of money. Only one month is involved in the instant case, but assessments against petitioner running into the tens of thousands of dollars are being held in abeyance pending the determination of the very important issue presented here.

Moreover, the failure of the Court of Appeals—despite the fact that the matter was explicitly and re-

peatedly called to its attention—to recognize and apply Revenue Ruling 54-47 raises a serious question as to the effect and importance of such rulings. In 1955 the Commissioner of Internal Revenue issued 758 Revenue Rulings. During the first six months of 1956 he issued an additional 300 Revenue Rulings. These are not unlike court decisions. Many of them deal specifically with factual situations and show whether or not, and in what respect, the revenue laws apply to such situations. Others, like Revenue Ruling 54-47, are more general in language and application. It is highly important that this Court advise the millions of taxpayers the extent to which they may be entitled to rely upon the rulings of the type here involved in the orderly administration of their affairs and in tax litigation in the federal courts.

3. The Decision Below Raises an Important Problem of Proof as to the Collection of the Federal Transportation Tax

The Court of Appeals stated that the District Court's decision that petitioner had collected transportation tax from the airline passengers was supported by inference. The inference, in turn, was based upon nothing except (1) the use of a bus on one early morning emergency trip out of approximately 800 trips made during the month involved, for which bus trip the driver charged the regular fare, and (2) a raise in fare charged passengers, which increase was made 13 months and 21 days after the Deputy Commissioner of Internal Revenue informed petitioner of his opinion that petitioner's airport transportation service was subject to tax. Even if standing alone, these facts might possibly give rise to such an inference, the same is overcome by the overwhelming undisputed evidence in this case—evidence

which clearly established that no such tax was either collected or intended to be collected.

The facts disclose that while petitioner raised its fares for airline passengers, the fares charged to the employees of the airlines were not increased. The increase constituted petitioner's first raise in fares since the end of World War II. It was made after four years of rising costs and was based upon the increased cost of operation. There was no correlation between the Deputy Commissioner's letter and the increase in fares. Likewise, an isolated use of a bus by a driver in an emergency in the early morning is not entitled to the weight which both the District Court and the Court of Appeals gave it.

The uncontradicted evidence disclosed that the full amount of the fare collected by petitioner was recorded on its books as revenue and included in its income for all purposes, including income tax purposes. Income taxes were paid upon the full amount collected.

Petitioner's counsel in the District Court and in the Court of Appeals acted as counsel for the taxpayer in *Royce* v. *Squire, supra.* Based upon his experience in the *Royce* case, petitioner's counsel advised petitioner not to collect the tax for the reason that its airport transportation service was not "on an established line" within the meaning of Section 3469 (a). Petitioner's counsel knew and informed petitioner that if it were to collect the tax it would be impossible to have a judicial determination of whether or not its operation was "on an established line". On the basis of this advice, petitioner scrupulously avoided both collecting a tax from limousine passengers and giving

any appearance that a tax was being collected. In view of this, it is unreasonable to assume that petitioner, notwithstanding all the evidence to the contrary, actually did collect a tax.

It is important that a ruling be made by the Supreme Court on the question whether in tax litigation, in the absence of any evidence introduced by the Government, one or two remote and isolated events not in themselves indicating whether a tax was collected can give rise to an inference that such tax was collected in the face of direct and undisputed evidence that such tax was not collected.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully granted,

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